

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

**MICHAEL McBEE v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Knox County  
No. 83321 Ray Jenkins, Judge**

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**No. E2006-00097-CCA-R3-PC - Filed August 29, 2006**

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The petitioner, Michael McBee, appeals the trial court's order dismissing his petition for post-conviction relief. The state has filed a motion alternatively requesting that this court dismiss the appeal or affirm the trial court's denial of relief pursuant to Tennessee Court of Criminal Appeals Rule 20. The petition is barred by the statute of limitations and was properly dismissed. Accordingly, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed  
Pursuant to Rule 20, Tenn. Ct. Crim. App. R.**

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Michael McBee, Mountain City, Tennessee, Pro se.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Randall E. Nichols, District Attorney General, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

In December 1994, a Knox County jury convicted the petitioner for two counts of aggravated robbery. As a Range III persistent offender, the trial court sentenced the petitioner to thirty years imprisonment on each count and ordered the sentences to run consecutively for an effective sixty-year sentence.<sup>1</sup> On appeal, the judgment was affirmed. See Michael Eugene McBee and Jeffrey Eugene Dunlap v. State, No. 03C01-9509-CR-00276 (Tenn. Crim. App. Oct. 31, 1997), app. denied (Tenn. June 8, 1998). On November 18, 2005, the petitioner filed for post-conviction relief claiming that he received ineffective assistance of counsel at trial. On December 9, 2005, the trial court

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<sup>1</sup> A co-defendant, Jeffrey Eugene Dunlap, was likewise convicted and sentenced for his participation in the crimes.

dismissed the petition as barred by the statute of limitations. See Tenn. Code Ann. § 40-30-102. The petitioner timely filed a notice of appeal on January 6, 2006.<sup>2</sup>

In his petition, the petitioner concedes that his former trial counsel "told him an appeal was filed" from his 1994 conviction. Both in his petition and before this court, however, the petitioner states that because counsel declined or was unable to provide him with any information or documents, he "cannot be sure an appeal was ever filed." The petitioner acknowledges that the instant post-conviction petition was filed well beyond the statute of limitations, but asserts that his ineffective assistance of counsel claim should have been heard because, in addition to her allegedly deficient performance at trial, counsel failed to advise the petitioner "that no appeal was in fact in progress." The petitioner further contends that he should be afforded an opportunity to challenge the post-conviction statute of limitations as being unconstitutional.

Tennessee Code Annotated Section 40-30-102 (a) provides that a person must petition for post-conviction relief within one year of the date on which the judgment became final or consideration of the petition is barred. The statute emphasizes that "[t]ime is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise." Tenn. Code Ann. § 40-30-102(a).

In the present case, the petition was filed more than seven years after the supreme court denied permission to appeal, and well beyond the one-year limitation period. See Rule 11, T.R.A.P. Other than asserting his lack of knowledge whether counsel had actually taken a direct appeal from his conviction, as she admittedly told the petitioner she had, the petitioner does not explain his failure to timely to pursue post-conviction relief in the years that followed. In summary, the petition is untimely filed and does not fall within any of the limited exceptions to the one-year statute of limitations. See Tenn. Code Ann. § 40-30-102 (b). Further, the court concludes that this is not a case in which due process considerations require that the statute of limitations be tolled. See Williams v. State, 44 S.W.3d 464 (Tenn. 2001) (holding that strict application of the statute of limitations to cases in which a petitioner has been unilaterally deprived of the opportunity to seek second-tier review of his convictions through misrepresentations of his attorney may violate due process). As noted, the petitioner's counsel in fact filed a direct appeal on his behalf, and timely pursued second-tier appellate review in the Tennessee Supreme Court following entry of this court's adverse judgment on appeal. At most, the petitioner's allegations amount to a claim that counsel was negligent in failing to inform him of the disposition of these appellate proceedings. For each of the foregoing reasons, we conclude that the petition was properly dismissed as time-barred.

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<sup>2</sup>We note that in support of the state's alternative motion to dismiss, counsel incorrectly alleges that the petitioner's notice of appeal was untimely filed on "June 13, 2005, almost four months after judgment was entered . . . ." As recited herein, the record reflects that the challenged order was not filed until December 9, 2005, and a timely notice of appeal followed.

Accordingly, the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20 of the Rules of the Tennessee Court of Criminal Appeals.

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JOSEPH M. TIPTON, JUDGE